

Contracts I
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Sample Exam Question #1 - Model Answer

Pennybakers is a small, but successful, interior design business located in Athens, Georgia. Wanting to expand into graphic design and advertising, Pennybakers' principal, Petunia Pennybaker, contracted with an upstart computer engineering firm, Scott & Co. ("S&C"), to design customized graphics software. S&C's chief engineer, Adam Scott – who Petunia met on a flight from Atlanta to San Jose, California (where S&C is headquartered) – promptly designed and tested the software. Claiming that he was dissatisfied with the software's performance on Pennybakers' existing computers, Adam suggested that Pennybakers buy a new computer specially designed for graphics software, the Scott GR8 ("GR8"), to run the new software. S&C manufactures the GR8. Delighted with Adam's demonstration of the custom software using the GR8, Petunia willingly agreed to buy the GR8 to run the software. The parties amended their contract to include Pennybakers' purchase and S&C's delivery of the GR8.

Less than two weeks after taking delivery of the software and the GR8, Petunia began to notice a recurrent glitch that caused a small, bespectacled dog to appear randomly in the graphical layouts she designed using the GR8. Acting on a hunch, Petunia discovered the same glitch while running other software that had been installed on the GR8. When she called S&C to complain, her call was directed to S&C's customer service specialist, Bob, who was unable to solve Petunia's problem. The problem persisted, causing Pennybakers to lose a lucrative advertising contract for the Greater Atlanta Garfield Fan Club. Finally fed up with it all, and wanting to prevent any further loss of business, Pennybakers purchased a MicroSpaz 3000GT computer for \$3,000 and new graphics software for \$2,000. Pennybakers also filed suit against S&C, alleging breach of any and all applicable express or implied warranties.

The parties' pleadings and discovery reveal, in addition to the foregoing, that: (1) Pennybakers paid S&C \$25,000 to design the custom software; (2) Pennybakers paid S&C \$2,500 for the GR8 computer; (3) Pennybakers paid S&C the entire \$27,500 prior to taking delivery of the software and the GR8; (4) the parties agree that any glitch is a "hardware" problem with the GR8, not a "software" problem; (5) Pennybakers' expert witness has opined that the software designed by S&C would have performed as well or better on any number of other commercially-available computers as it did on the GR8 before the glitch appeared; (6) Petunia's assistant, Cleo, loaded the software onto another computer and ran it for several weeks without ever encountering the glitch; (7) the warranty card that accompanied the GR8 computer did not disclaim any implied warranties and expressly warranted that the computer would operate free of any errors, other than those caused by third-party software, for a period of one year from the date of

purchase; (8) the contract Pennybakers lost with the Greater Atlanta Garfield Fan Club would have netted Pennybakers a profit of at least \$25,000; and (9) the MicroSpaz 3000GT and the new graphics software have been glitch-free.

Assuming that the courts in the jurisdiction whose law governs this dispute (1) have held that customized software is not a good and (2) follow the majority rule with respect to mixed contracts, should UCC Article 2 govern Pennybakers' claims against S&C in this lawsuit? Please explain.

No. If the gravamen of the action test applied, Article 2 would govern Pennybakers' action against S&C. The parties have stipulated that the Dogbert glitch is a "hardware" problem, rather than a "software" problem – that is to say, the defect originated with the GR8 computer, rather than with the customized software. The computer is clearly a "good" under UCC § 2-105. However, the Question instructed you to assume that the law of a jurisdiction whose courts follow the majority rule with respect to mixed contracts governs this dispute. The "majority rule" with respect to mixed contracts is the "predominant purpose" test. Here, it appears that Pennybakers' predominant purpose was to pay S&C to design customized graphics software. Pennybakers only purchased the GR8 computer because S&C recommended it to run the software that Pennybakers engaged S&C to write. This reading of the facts is supported by the relative expenditures on the software and hardware: Pennybakers paid S&C \$25,000 to design the software and only \$2,500 for the computer. Software design, although it often yields one or more diskettes or CDs containing the code, is primarily a service, rather than a good. This is particularly true in this case, because the software did not exist – and, therefore, was not identifiable, much less tangible or movable – when the parties entered into the contract. *See* UCC § 2-105. Therefore, if Pennybakers' predominant purpose was to purchase services – to wit, the custom software – then Article 2 would not apply to the transaction if the court applied the predominant purpose test.